

# **Assistant Secretary Kevin Wolf's Remarks Update Conference on Export Controls and Policy August 31, 2010**

Thank you Eric for your kind introduction. Thank you also for your terrific leadership of BIS. It is a pleasure working for you as we work together to help ensure our national and economic security.

As you can see from the President's, the Secretary's, and the Under Secretary's comments, the Obama Administration takes export control reform seriously. Moreover, there is strong inter-agency cooperation on the reform effort generally and on the day-to-day aspects of running the export control system. Of course, the departments don't always agree on every issue all the time.

I am nonetheless impressed and heartened by the commitment of the staff and leadership of each of the departments to work together to make the export control system better and more focused on the contemporary national and economic security concerns.

The presentations this morning go from the general to the more specific. Before I leave the trees and get in to the tall grass of export controls, I want to first thank everyone at BIS, particularly in Export Administration, for their terrific work and commitment to public service. I am thrilled to be here and honored to be working with this group of outstanding career professionals.

When people ask how I like government service, my short answer is that I'm doing well, doing good, and having fun. I'm incredibly enthusiastic and optimistic about the reform effort, working with my interagency colleagues, and running Export Administration at BIS. Also, people laugh at my jokes a lot more than they used to.

My two main tall grass topics are the content and direction of the reform effort and a discussion of some of the more significant developments with BIS and the EAR since the last Update.>

## **The Reform Effort**

Most of the public attention regarding the reform effort has been on the Phase III aspects – the four “singularities” the President first set out earlier. No less important are the Phase II changes the Administration is working on that can be done without legislation or a single agency.

The primary aspects of Phase II involve (a) developing the three-tiered control criteria; (b) screening items on the two control lists -- the USML and the CCL -- against those criteria; (c) revising the USML and the CCL to make them more “positive,” and (d) developing a licensing policy for Tier 2 and Tier 3 items.

In addition to the other efforts Eric mentioned – (a) harmonizing definitions of common terms that are used in the ITAR, the EAR, and the sanctions regulations and (b) developing a common export license application form that the Departments of State, Commerce, and Treasury will use – we are also developing a single list of proscribed persons and entities that will consolidate all the various lists used by the Departments of State, Commerce, and Treasury. The goal of this effort is to make compliance with end-user based controls easier for exporters.

Each one of these efforts will be significant to exporters and practitioners. We will be getting in to the weeds on these topics later. For now, I will get in to the tall grass of the control list review effort.

I realize Eric generally described the effort, but it is worth repeating a little since it is such a fundamental change to the current list structure. In sum, the goal of the effort is to enhance national security by reviewing and revising the USML and the CCL so that they:

1. are “tiered” consistent with the three-tiered criteria the U.S. Government has established to distinguish the types of items that should be controlled at different levels for different types of destinations, end-uses, and end-users;
2. create a “bright line” between the two lists to clarify jurisdictional determinations and reduce government and industry uncertainty about whether particular items are subject to the jurisdiction of the ITAR or the EAR; and
3. are structurally “aligned” so that they later can be combined into a single list of controlled items by the end of Phase III.

In order to accomplish these tasks simultaneously, the USML and, to a lesser degree, the CCL must be revised so that they are “positive lists.”

The background to this effort is the decision to screen all items on the USML and the CCL against the Criteria the U.S. Government has developed to determine new control levels consistent with contemporary national security threats and other issues. If an item type falls within the scope of one of the Criteria’s three tiers, the item should be controlled for export, reexport, and in-country transfer at the level set forth in the licensing policy the U.S. Government is developing for that tier. If an item type is determined not to be within the scope of any of the three tiers, it should not be on a control list. This type of screening and tiering cannot easily be done for controls that are not based on objective criteria.

Another motivation for the effort is the U.S. Government decision that, during Phase II, the USML and the CCL should be revised and aligned so that there is a clear jurisdictional “bright line” between the items subject to the control of the ITAR and the control of the EAR.

The U.S. Government is committed to creating a clear jurisdictional “bright line” because exporters, U.S. Government officials, and foreign parties cannot always easily and consistently determine whether many types of commodities, technologies, and software – and directly related services – are subject to the ITAR or the EAR. This has huge practical impacts on the licensing obligations associated with any particular export.

The creation of an aligned, positive, “bright line” is also a vital interim step in the U.S. Government’s plan to have, by the end of Phase III, a single list of controlled items that is divided into three tiers and administered by a single licensing agency under a single set of export control regulations. The interim “bright line” is necessary because the structures of the USML and the CCL are significantly different, as Eric described.

The first step in the list review effort will be for subject matter experts assigned to each category of items to apply their expertise and judgment to decide what the general universe of defense articles are that should be ITAR controlled. After a review team has generally mapped out the broad scope of items that should be USML-listed defense articles, it will then need to translate the judgments of the experts into objective, positive control lists consistent with the three-tiered criteria.

They will at the same time also need to decide what, if any, types of items that are now actually or arguably ITAR-controlled should become EAR-controlled in order (a) to differentiate items

that may not need the more rigid national security and foreign policy controls of the ITAR; (b) to take advantage of the EAR's more flexible country group-based controls; and (c) to create a bright line between the two lists.

This task of translating subjective judgments into objective criteria is the key to the success of the entire tiered, positive list review and revision effort.

After a review team identifies the general types of items that should remain USML-controlled defense articles, it will organize each USML category so that it tracks the A, B, C, D, E structure of the CCL and also has an additional F and G "Group" to address ITAR-specific defense service and manufacturing controls.

Within each category Group (A, B, C, etc.), the review team will identify the types of defense articles that fall within that category Group's heading and any one of the three control Criteria.

This means that the review teams will not include in any of the revised USML categories any defense articles that do not fall within any of the control Criteria. A different group of policy officials will, with interagency consensus, decide which other types of items should nonetheless be added to Tier 3 USML or CCL controls pursuant to the Criteria for statutory, national security, foreign policy, or human rights reasons, or other multilateral obligations.

When revising the lists of defense articles, the review teams must abide by various guidelines.

For example, the current plan is that revised USML categories must not contain any (a) catch-all controls for generic "parts," "components," "accessories," "attachments," or "end-items" or (b) other types of controls for specific types of defense articles because, for example, they were "specifically designed or modified" for a defense article.

Also, items are not to be listed on both the CCL and the USML unless there are specific technical or other objective criteria – regardless of the reason why any particular item was designed or modified – that distinguish between when an item is USML-controlled and when it is CCL-controlled.

"Specially designed" – which is different than "specifically designed" -- is to be used as a control criterion only when required by multilateral obligations or when no other reasonable option exists.

After the tiering and positive listing is completed with respect to the types of articles controlled by a USML category, the government will identify the types of items in the USML category that should be moved to the jurisdiction of the EAR after any applicable Arms Export Control Act section 38(f) obligations are satisfied.

Specifically, the government will identify for potential transfer to the CCL items that are now considered USML-listed defense articles but that, based on the teams' review, have been historically USML-controlled defense articles merely by virtue of modifications to their *form* or *fit* (as opposed to their *function*) and are types of items that do not provide a significant military or intelligence advantage in and of themselves.

Items that are to be moved to the CCL will fall into one of five controls on the EAR: (a) an amended existing ECCN, (b) a new Holding ECCN, (c) a new CML ECCN that Commerce plans to create in coordination with State, (d) a new ECCN, or (e) EAR99 status. The details on the structure of each of these approaches and the various levels of controls within them are still being worked out.

Licensing Policy: Commerce, in cooperation with Defense, State, and Energy, is also developing a regulatory proposal that will provide more flexible licensing authorizations as we move down the control tiers. This approach will eliminate certain dual-use licensing requirements for allies and partner nations, consistent with our statutory and international obligations.

The Department of Commerce will implement the new licensing policies in the EAR by creating a new Part 740 License Exception that will authorize the export and re-export of EAR-controlled items to specified destinations without an individual validated license. The details of precisely which countries will be fixed to which of the tiers are still being worked out.

The primary reason for adopting a License Exception as the method for implementing the new licensing policies is that the use of License Exceptions in the EAR can easily be made conditional. That is, if an exporter wants to export an item without a license under the scope of a License Exception, there are additional steps and obligations pertaining to the export.

The new License Exception will thus be a vehicle for implementing some of the “higher fences” aspects of export control reform that Eric mentioned. Specifically, use of the new License Exception will impose a licensing requirement on the reexport from abroad, even by foreign persons, to most destinations outside the exception’s applicable country group of items originally exported from the United States under the authority of the exception.

The License Exception will also likely impose as a condition for its use some combination of (a) end-use restrictions and assurances, (b) destination control statements, (c) reporting requirements that distinguish between end-users and distributors, and (d) recordkeeping requirements. In addition, based on the data derived from the reporting requirements, Commerce would conduct outreach to U.S. companies with a history of exporting to destinations eligible for the License Exception on the enhanced compliance requirements.

### **The Export Control System Today**

While the Bureau works with its interagency partners on Phase II tasks and plans for Phase III of the reform effort, we continue to respond to the day-to-day export control challenges. For example:

BIS processed last year approximately 20,000 licenses. We project that by the end of this year there will be a 20% increase in licenses processed.

As part of our effort to ensure the efficiency of the regulatory process, the Bureau has issued this year 35 regulations, proposed rules, and Notices of Inquiry involving dual-use trade. In comparison, we issued 26 amendments last year.

The rules and notices address a number of essential export control issues, including (a) more focus on end-user and end-use controls; (b) export control initiatives; (c) implementation of export control regime changes; and (d) notices of inquiry on emerging issues.

With respect to the focus on end-user and end-use based controls, we have since 2008 issued 11 rules significantly expanding the Entity List of foreign parties warranting additional scrutiny. Since its expansion, BIS has added 185 entities to the Entity List and removed 9 entities. This is part of the general effort to ensure that export controls are tailored more toward specific end-uses and end-users when country-based controls may be too broad or too narrow.

Export Control Initiatives: On June 25, we published our first encryption reform regulation which enhances our national security by allowing the government to focus its resources on the more sensitive encryption items, while cutting the red tape by eliminating the review of readily

available encryption items such as cell phones and household appliances. As described in the preamble to this rule, it is the first step in our efforts to reform U.S. encryption export controls. We will continue to review the encryption rules to further enhance national security and competitiveness.

**Implementation of Export Control Regime Changes:** I recently signed the rule implementing the 2009 changes to the Wassenaar Arrangement's Dual-Use list. It is now at the Office of the Federal Register waiting to be published. The rule adds, removes or amends certain items that are controlled for national security reasons in most CCL categories and affects 40 ECCNs. Examples of the changes include:

- a. Revisions to the control parameters for plasma dry etching equipment (i) to make the control of this equipment consistent with current integrated circuit production sizes, (ii) to maintain control on more advanced equipment, and (iii) to remove controls on older equipment and spare parts that are no longer of proliferation concern.
- b. Revisions to the control parameter for automatic loading multi-chamber Central Wafer Handling systems to relax controls on two classes of systems that have been found to be of less proliferation concern and to place the focus on more advanced systems.
- c. Adding paragraph 6A001.a.1.e to control active individual sonars specially designed or modified to detect, locate and automatically classify swimmers or divers. This new control is necessary to close the loophole that exists for these commercial sonar-based detection systems that are nearly equivalent to existing military systems.

**Regime Changes Continued:** During this past year, we also issued rules implementing changes agreed to at the Australia Group and the Missile Technology Control Regime. We also revised License Exception GOV to provide authorization for exports and reexports of items for use on the International Space Station.

**Notices of Inquiry:** We also recently issued a notice that requested public comment on best practices for exporters and governments to address transshipment of export control items through third countries -- an important security and non-proliferation issue. We also are planning to issue a notice seeking input on the impact of export controls on small and medium size exporters.

**Advisory Committees:** On behalf of the Bureau I would like to thank our seven Technical Advisory Committees for their help in revising our control lists. We value the contributions of the TACs and are recruiting new members to many of the TACS.

**Education and Outreach:** As Eric mentioned, education and outreach are vital to BIS's mission. BIS, for example, last year conducted 42 domestic outreach seminars in 18 states. BIS staff also led or participated with the Department of State in 28 meetings with their foreign government counterparts to address the risk of diversion of unauthorized items to unauthorized destinations or end-users.

**Switching from export controls,** I want to mention the treaty compliance work BIS is responsible for. Specifically, BIS implements the treaty compliance aspects of the Chemical Weapons Convention and the Additional Protocol to the U.S.-IAEA Safeguards Agreement and is engaged in efforts to strengthen implementation of the Biological Weapons Convention.

BIS collects and transmits to the Organization for the Prohibition of Chemical Weapons declarations for approximately 450 chemical facilities each year on behalf of the United States. Furthermore, BIS facilitates the inspection, by international inspectors, of approximately two

dozen U.S. chemical industry sites under the CWC each year and BIS has facilitated 140 such inspections to date.

BIS implements several of the industry aspects of the Additional Protocol, a bilateral treaty that supplements and amends verification arrangements under the existing Safeguards Agreement between the United States and the International Atomic Energy Agency. The IAEA will likely inspect an industry location in the United States this year under the complementary access provisions of the Protocol. The Commerce Department is responsible for declarations from certain research and development activities as well as uranium mines and will facilitate their inspections, called Complementary Access, when they occur.

President Obama released the National Strategy for Countering Biological Threats last year and the Commerce Department is continuing to define its roles in implementing this strategy. Of particular interest is the constructive paradigm shift in the implementation of the Biological Weapons Convention. The recent avian flu epidemic has caused States Parties to the BWC to recognize a link between the preparation for and response to naturally occurring and deliberately caused diseases. This public health nexus has resulted in an opportunity for the health industry, and other industries, to play an important role in the solution to biological weapons concerns. As a result, our Materials Technical Advisory Committee is establishing a working group to consider ways of improving implementation of the BWC.

Thank you for coming today. Stay tuned. And don't hesitate to send me or my staff your suggestions, complaints, issues, concerns, and even compliments. I actually do read everything that is sent to me.

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